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No. 04-____

IN THE

Supreme Court of the United States

CATERPILLAR INC.,
Petitioner,

v.

STURMAN INDUSTRIES, INC., ODED E. STURMAN, AND CAROL K. STURMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment mandates the implied juror bias doctrine for exclusion of jurors in civil cases, and if so, whether the doctrine automatically disqualifies the spouse of an employee of a party. The Federal Circuit ordered a new trial on this basis, in conflict with the Eighth Circuit (which rejects the implied bias doctrine altogether), the Second, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits (which have expressed doubts about the doctrine or limit its application), and the Ninth Circuit (which has affirmed a civil verdict reached by a jury containing two employees of a party).

2. Whether a party who has "specifically stated it would not individually challenge" a juror for cause, and who forgoes the opportunity to exercise a peremptory strike against that juror, may obtain reversal on appeal without establishing actual bias. On this question, the Federal Circuit construed this Court's opinion in *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000), in a way that conflicts with decisions of other courts of appeals.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Petitioner states that it has no parent companies and no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Caterpillar Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. *infra*, 1a-42a) is reported at 387 F.3d 1358. The district court's opinion (App., *infra*, 43a–56a) denying respondents' motion for a new trial is not reported.

JURISDICTION

The court of appeals issued its judgment on October 28, 2004 (App., *infra*, 59a-60a) and denied a timely petition for rehearing on January 7, 2005. *Id.* at 57a-58a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. AMEND. VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT

Contrary to decisions of this Court and in conflict with other courts of appeals, the Federal Circuit has greatly enlarged the arsenal a losing party may belatedly employ to sabotage a jury verdict. The decision below grants a new trial – on the controversial ground of implied juror bias – to a party who, as the Federal Circuit notes, "specifically stated it would not individually challenge" the juror, and who passed on the same juror when three peremptory challenges still remained. In similar circumstances, other circuit courts do not overturn verdicts. And no federal appellate court has vacated a judgment on the ground upon which the Federal Circuit relied – that the spouse of an employee of a party (who worked at a facility and on products totally unrelated to the case) is irrebutably presumed to be biased as a matter of constitutional law.

In short, the decision below weakens jury verdicts by making them extraordinarily fragile in ways that are incompatible with constitutional imperatives to preserve jury determinations. This departure from established constitutional standards on an issue of such far-reaching practical impact clearly justifies certiorari. The decision below also warrants this Court's review because it is an ideal

vehicle for resolving two related questions on which the courts of appeals are divided:

First, whether the doctrine of implied juror bias is constitutionally-mandated and has any continuing validity in light of this Court's strong criticism and, if so, whether the doctrine should be expanded to the unprecedented lengths charted by the Federal Circuit. The sharp division in the circuits stems, in large part, from the tension between the Court's opinion in *Smith* v. *Phillips*, 455 U.S. 209 (1982), which virtually sounds the death knell for claims of implied juror bias, and Justice O'Connor's concurring opinion in that case, which contemplates some limited vitality for the doctrine (not including the grounds on which the Federal Circuit relied). As the opinions in *Smith* v. *Phillips* have generated such a cacophony of conflicts in the circuits, this Court's review is strongly indicated.

Second, "whether normal principles of waiver . . . disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 318 (2000) (Scalia, J., concurring in the judgment). In conflict with the decision below, other courts of appeals roundly criticize the gamesmanship of counsel who forgo opportunities to challenge a juror and later seek to undermine the verdict because of that juror's service. On this point, the division of authority in the lower courts recapitulates the dissonance between the Court's opinion in *Martinez-Salazar* (on which the Federal Circuit relied), and Justice Scalia's concurring opinion (which foresaw just the sort of problem that is present in this case). On this related issue as well, resolution by this Court is needed to end the threat to hard-fought jury verdicts that this case presents.

1. The underlying dispute involves trade secret misappropriation, conversion and breach of contract claims between Caterpillar and the Sturmans regarding fuel injector devices. The case was filed in the United States District Court for the Central District of Illinois, in Peoria, where Caterpillar is headquartered. Respondents never moved for a change of venue.

Cognizant that "Caterpillar is a large citizen in this district, this community," the district court observed at the outset of jury voir dire that "I suspect there are lots of citizens who are impacted by Caterpillar's presence. It could be positive, it could be negative." App., *infra*, 87a. Commenting specifically on the well-known history of "conflicts between Caterpillar and its union," the court noted that "there may be union members who have feelings about Caterpillar that will prevent them from being fair and impartial." *Id.* at 87a-88a. Even before any further inquiry, the court discharged all four potential jurors who responded affirmatively to the question: "Is there any one here who simply because of Caterpillar's presence as a party, feels that they could not be fair and impartial to both sides, including Caterpillar, in this case?" *Id.* at 88a.

Of the remaining panel members, seventeen indicated that they (or family members) were currently or previously employed by Caterpillar. *Id.* at 97a-107a, 113a-119a, 120a-130a, 143a-148a, 152a-153a, 155a-165a. Respondents then made a blanket challenge to exclude only eleven of those jurors for cause, namely Caterpillar employees, retirees or their "closely related" family members. *Id.* at 175a-176a. Respondents did not identify the eleven individual panel members they were challenging. *Id.*

Although the district court stated it would "not grant this motion in total" (*id.* at 180a), it excluded the three

Caterpillar employees who knew potential witnesses in the case. *Id.* at 180a-181a. All other challenges for cause arising from Caterpillar employment would be decided on an individual basis. *Id.* at 181a. Respondents then challenged five individual jurors for cause (all based on employment or familial relationships with Caterpillar employees) and the district court granted three of those challenges. *Id.* at 181a-193a. At no time in this process did respondents mention any objection to Juror No. 3, Diana Adams-Trantham, a medical office bookkeeper. Indeed, as the court of appeals observed, respondents "specifically stated [they] would not individually challenge Juror No. 3...." App., *infra,* at 21a; *see also id.* at 46a-47a (district court finding same).

For peremptory challenges, the district court utilized a "no back-striking" procedure (App., *infra,* at 64a); once a party passed a prospective juror without exercising a peremptory challenge it could not return to strike a juror previously accepted. At their request, respondents were granted additional peremptory challenges so they had a total of five. *Id.* at 61a-64a. When the selection process reached Juror No. 3 (*id.* at 194a), respondents had exercised only two of their five challenges. *Id.* With three peremptories remaining, respondents passed Juror No. 3 without challenge.[1] *Id.* at 194a-195a.

2. Following a month-long trial, the jury reached a unanimous verdict favorable to Caterpillar. On post-trial motion, respondents raised their objections to Juror No. 3 for the first time. The district court rejected that contention as

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[1] Respondents subsequently used their remaining peremptory challenges to strike three jurors, none of whom worked for Caterpillar themselves or had a spouse who did so. *Id.* at 194a; *see id.* at 131a-133a, 143a-146a, 149a-150a (voir dire questioning of final three jurors peremptorily challenged by respondents).

waived because "the Sturmans were aware of Juror No. 3's marriage to a Caterpillar employee yet declined to individually challenge her for cause when offered the opportunity by the Court to do so. App., *infra*, at 47a.

3. On appeal pursuant to 28 U.S.C. § 1295(a)(1), the United States Court of Appeals for the Federal Circuit vacated the judgment and remanded for a new trial solely because of Juror No. 3's service. Although "Sturman specifically stated it would not individually challenge Juror No. 3, despite having additional grounds for doing so" (App., *infra*, at 21a), the panel held that respondents had not waived their objection to her: "we disagree with Caterpillar and the district court that Sturman had to individually challenge Juror No. 3 to later avoid waiving its objection." *Id.* at 20a.

On the merits of respondents' constitutional argument, the Federal Circuit held that the doctrine of implied bias "helps ensure the right to an impartial jury and a fair trial" and "applies equally" in civil and criminal cases. *Id.* at 23a-24a and n.2. In defining and applying the doctrine of implied bias in this case, the Federal Circuit noted it would apply "the law of the Seventh Circuit" and would "also look to opinions of the other regional circuits for their persuasive authority." *Id.* at 23a. The panel held that the district court "erred by not dismissing Juror No. 3 for cause" in response to defendants' original blanket challenge (*id.*) because, as a matter of law, a spouse's employment must always constitute at least a "tiny financial interest" in the case and result in automatic exclusion. *Id.* at 25a. Without finding any actual bias on the part of Juror No. 3 (an inquiry it acknowledged would be governed by a deferential standard of review), the panel applied a de novo standard to the issue of implied bias. *Id.* at 15a.

Having determined that Juror No. 3 was *per se* excludable, the Federal Circuit turned to the appropriate remedy. On this point, the court did not address whether respondents' Seventh Amendment or due process rights were prejudiced or impaired. Instead, the court held that vacatur of the jury verdict and remand for a new trial were required simply "[b]ecause Juror No. 3 actually sat on the jury." *Id.* at 27a. For this automatic new trial rule, the panel relied on this Court's opinion in *United States* v. *Martinez-Salazar*, which the panel interpreted as "ordering a new trial because a biased juror actually sat on the jury." *Id.*

REASONS FOR GRANTING THE PETITION

Contrary to prior decisions of this Court and in conflict with decisions of other courts of appeals, the Federal Circuit incorrectly resolved two related questions of paramount importance to the application of constitutional standards to jury verdicts. While other courts of appeals have correctly perceived this Court's aversion to *per se* categories of implied juror bias, the decision below expands the implied bias doctrine to overturn a verdict on the attenuated ground that one juror is the spouse of an employee of a party. The Federal Circuit could not point to a single federal appellate decision that ordered a new trial on that basis. In contrast, other circuits have rejected any reliance on the implied bias doctrine, or have carefully limited its application to much more direct and substantial instances of demonstrable bias. Indeed, prior cases have upheld verdicts even where employees of parties were themselves jury members. *Nathan* v. *Boeing*, 116 F.3d 422 (9th Cir. 1997). In short, . . . "the federal courts of appeals [are] split on the issue of implied bias." *Dyer* v. *Calderon*, 151 F.3d 970, 995 (9th Cir. 1998) (O'Scannlain, J., dissenting).

By itself, the Federal Circuit's unwarranted expansion of the implied bias doctrine fully justifies certiorari to resolve this conflict and to end any residual uncertainty in the lower courts over the Court's proscription of implied bias in *Smith* v. *Phillips*, 455 U.S. 209 (1982). The need for this Court's review is even more compelling in light of the Federal Circuit's reading of *Martinez-Salazar*. Indeed, the decision below exemplifies the very danger about which Justice Scalia's concurring opinion in *Martinez-Salazar* warned: allowing a party to object on appeal to "the seating of a juror he was entirely able to prevent." 528 U.S. at 318 (Scalia, J. concurring in judgment). In contrast to the Federal Circuit decision in this case, other courts of appeals have recognized that vacatur in such circumstances would constitute a threat to the sanctity and finality of jury verdicts. Contrary to the constitutional imperative to preserve such sanctity and finality, the Federal Circuit has provided a how-to manual for parties to sabotage trials by seating jurors they had multiple opportunities to exclude, and then seeking appellate relief to undo an adverse verdict.

Because of the importance and practical impact of these issues, which frequently arise and on which the lower federal and state appellate courts are sharply divided, this Court's review is fully warranted.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SHARP SPLIT OF AUTHORITY ON THE IMPLIED JUROR BIAS DOCTRINE

A. This Court Has Long Been Averse to Claims of Implied Juror Bias

This Court has long been hostile to claims of implied bias as a basis for excluding jurors – or reversing jury

verdicts – in the absence of actual bias by an individual juror. Accordingly, in *United States* v. *Wood*, 299 U.S. 123 (1936), the Court rejected claims of implied bias and upheld a statute allowing federal employees to serve on juries in the District of Columbia when the government was a party to the suit. The essence of the Court's reasoning was that the common law did not preclude government workers from serving on juries even when their employer was a party. *Id.* at 138-41. *See Patton* v. *Yount*, 467 U.S. 1025, 1037 n.12 (1984).

The Court re-affirmed *Wood* in *Frazier* v. *United States*, 335 U.S. 497, 510-11 (1948) (no implied bias in criminal prosecution where all jurors were government employees), and in *Dennis* v. *United States*, 339 U.S. 162 (1950) (rejecting suspected Communist's contention that government employees were inherently biased against him because they had taken loyalty oaths to the federal government, the opposing party in the case). In particular, *Dennis* rejected the notion that theoretical "loss of employment" was a basis for finding implied bias. *See* 339 U.S. at 172 ("Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors. . . ."). These decisions are directly contrary to the Federal Circuit's conclusion that the Constitution requires the doctrine of implied juror bias and mandates application of that doctrine to vacate the verdict in this case.

In its most definitive consideration of the issue, in *Smith* v. *Phillips*, 455 U.S. 209 (1982), this Court strongly suggested that the implied bias doctrine is not viable for parties challenging jurors on a *per se* basis. The petitioner in *Smith* challenged his murder conviction after discovering that a juror had applied for a job with the prosecutor's office. *Id.* at 212. The district court found the implied bias doctrine

applicable and granted habeas relief. *See Phillips* v. *Smith*, 485 F. Supp. 1365, 1372-73 (S.D.N.Y.), *aff'd*, 632 F.2d 1019 (2d Cir. 1980). This Court reversed, noting that it "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215.

In a concurring opinion upon which some courts of appeals have relied, Justice O'Connor "express[ed] her view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances," *viz.*, a juror's employment with a party, a juror's being a "close relative" of a party, or a juror's being a "witness or somehow involved" in the underlying transaction. 455 U.S. at 221-22 (O'Connor, J., concurring).[2] Even those courts of appeals that rely on Justice O'Connor's concurring opinion have not expanded the implied bias doctrine to reverse a verdict on the basis stated by the Federal Circuit in this case.

B. Lower Courts are Irreconcilably in Conflict as to both the Viability and the Application of the Implied Bias Doctrine

Today, substantial uncertainty surrounds the implied juror bias doctrine among lower courts. Simply put, "the federal courts of appeals [are] split on the issue of implied bias." *Dyer*, 151 F.3d at 995 (O'Scannlain, J., dissenting). Courts are divided both as to (a) whether the implied bias doctrine is viable at all; and (b) if it is viable, when it applies.

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2 For example, the Federal Circuit (App., *infra*, at 15a) cited *Hurley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992), which in turn quoted Justice O'Connor's concurring opinion in *Smith v. Phillips*.

1. Courts are Split as to Whether the Implied Bias Doctrine is Viable and Compelled by the Constitution

The Eighth Circuit has definitively rejected the implied bias doctrine altogether, and requires the party challenging a juror to demonstrate actual bias. *See Rogers* v. *Rulo*, 712 F.2d 363, 367 (8th Cir. 1983) ("This court previously has rejected a *per se* theory of implied bias and has required that actual prejudice be shown"); *United States* v. *Kelton*, 518 F.2d 531, 533 (8th Cir. 1975) (same). Many federal and state courts have likewise rejected "implied bias" and—consistent with *Smith* and *Dennis*—have required a showing of "actual bias" when a party alleges jury partiality.[3]

Other circuits "have expressed doubts about the [implied bias] doctrine entirely." *Salvato* v. *Illinois Dep't of Human Rights,* 155 F.3d 922, 927 (7th Cir. 1998). The Eleventh Circuit, for example, "consider[s] such a *per se* rule [of juror disqualification] to be at odds with the United States

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[3] *See, e.g., Carr* v. *Robinson*, 1999 U.S. Dist. LEXIS 10164, at *18 (E.D. Mich. June 16, 1999) ("to maintain a claim of prejudice from trial counsel's failure to strike an allegedly biased juror, a defendant must show that the juror was actually biased against the defendant; implied bias is not sufficient"); *United States* v. *Berrios-Rodriguez*, 768 F. Supp. 941, 943 (D.P.R. 1991) ("Where jury partiality is alleged, there is not a presumption of prejudice; rather the defendant has the burden of proving actual prejudice") (citing *Smith*); *State* v. *Johnson*, 2003 Ohio App. LEXIS 1748, at *15 (Ohio Ct. App. Apr. 10, 2003) (Kilbane, J., concurring) ("A hearing is required to show actual prejudice because juror bias will not be implied") (citing *Smith*), *appeal denied*, 802 N.E.2d 154 (Ohio 2004); *Cassady* v. *Souris River Tel. Coop.*, 520 N.W.2d 803, 806 (N.D. 1994) ("To disqualify a prospective juror, a challenger must establish an actual bias, rather than a presumed bias, on the part of the prospective juror"); *People* v. *Gladstone*, 517 N.Y.S.2d 294, 295 (App. Div. 1987) ("an assertion of implied bias is not sufficient to disqualify jurors") (citing *Dennis*).

Supreme Court's instructions on how to evaluate the qualifications of individuals for jury service." *Depree* v. *Thomas*, 946 F.2d 784, 788 (11th Cir. 1991); *Williams* v. *Griswald*, 743 F.2d 1533, 1538 n.7 (11th Cir. 1984) (*Smith* "declined to use the urged 'implied bias' test"). The Fourth and Sixth Circuits have expressed similar doubts. *Fitzgerald* v. *Greene*, 150 F.3d 357, 365 (4th Cir. 1998) (questioning viability of implied bias doctrine) (citing *Person* v. *Miller*, 854 F.2d 656, 664 (4th Cir. 1988)); *United States* v. *Howard*, 752 F.2d 220, 223-24 (6th Cir. 1985) (discussing but declining to decide whether *Smith* overruled doctrine of implied bias).[4]

The creation and definition of *per se* categories of juror exclusion are more appropriately legislative functions. To that end, Congress has established certain *per se* exclusions to jury service by statute (*see* 28 U.S.C. §§ 1863(b)(6), 1865(b)(1)-(5)) as an effort to craft uniform standards of competency for federal jurors. *See Abbott* v. *Mines*, 411 F.2d 353, 354-55 (6th Cir. 1969). Implied bias is not one of the excluded categories—let alone family relation to an employee of a party. *Cf. Francone v. S. Pac. Co.*, 145 F.2d 732, 733 (5th Cir. 1944) (relying on Texas statute disqualifying party's employees from jury service); *Otis Elevator Co.* v. *Reid*, 706 P.2d 1378, 1383 n.4 (Nev. 1985)

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[4] Commentators have also opined that this Court's decisions have foreclosed the "implied bias" test. *See, e.g.*, Note, *The Right to an Impartial Trial is Protected by an Opportunity to Prove that Juror Bias or Prosecutorial Misconduct Affected the Case*, 26 HOW. L.J. 799, 812 (1983) (*Smith* rejected "implied bias" test); Sharon R. Gromer, *Sixth Amendment -- The Demise of the Doctrine of Implied Juror Bias: Smith v. Phillips*, 102 S. Ct. 940 (1982), 73 J. CRIM. L. & CRIMINOLOGY 1507 (1982) (essentially same); Comment, 49 MICH. L. REV. 130, 132 (1950) (*Dennis* "raises some question as to whether implied bias can ever be shown no matter what the circumstances").

(any *per se* implied bias exclusions from jury service should be promulgated by legislature, rather than courts).[5]

2. The Circuit Courts are Split as to When the Implied Bias Doctrine is Applicable

Even among the courts of appeals that recognize implied bias in some circumstances, courts have reached disparate and inconsistent results. *See Solis v. Cockrell,* 342 F.3d 392, 399 n.42 (5th Cir. 2003) (listing several "implied bias" cases and noting that "[f]ar more numerous are those cases in which courts have refused to apply the doctrine"), *cert. denied*, 540 U.S. 1151 (2004). No court has swung the pendulum to the extreme reached by the Federal Circuit in this case: vacating a verdict because a spouse of an employee of a party served on the jury.

Employment and Business Relationships. This Court has held, of course, (*see supra* at 8-9), that government employment is not sufficient to impute bias to a juror in a government case. *See Dennis,* 339 U.S. at 172; *Wood*, 299 U.S. at 138-41. With respect to the private sector, circuit courts are split as to the service of jurors who are themselves employed by a party.

The Ninth Circuit holds that employment with a party does not *per se* exclude a juror, and that actual bias must be shown. *See Nathan* v. *Boeing Co.,* 116 F.3d 422, 425 (9th Cir. 1997) ("Since we do not have a per se rule against employees serving as jurors in a case involving their employer, we hold that the district court did not abuse its

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5 *See, e.g., Jackson* v. *Bd. of Mayor & Aldermen*, 111 So. 828 (Miss. 1927) (common law prohibitions of jury service did not extend to employees' relatives).

discretion in permitting the two Boeing employees to remain on the panel"). As discussed *supra* (at 11), the Eighth Circuit does not recognize *per se* disqualification based upon employment (or any other factor). *See, e.g., Jamestown Farmers Elevator, Inc.* v. *General Mills, Inc.*, 413 F. Supp. 764, 775 (D.N.D. 1976) (holding that juror who owns stock or works for defendant company is not automatically disqualified), *aff'd in part, rev'd in part on other grounds,* 552 F.2d 1285 (8th Cir. 1977).[6]

Still other courts hold that "a commercial relationship between a juror's employer and a party -- does not constitute a sufficient basis for a challenge for cause where the juror expressly affirms her ability to sit fairly." *Bainlardi* v. *SBC Warburg*, 1998 U.S. Dist. LEXIS 19512, at *9 (S.D.N.Y. Dec. 11, 1998) (employee of defendant's "major customer" empanelled). Courts uphold service by jurors who have a variety of significant business relationships with parties. *See, e.g., Image Tech. Servs., Inc.* v. *Eastman Kodak Co.*, 125 F.3d 1195, 1220 (9th Cir. 1997) (upholding refusal to excuse

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[6] Among state courts, *see, e.g., Seals* v. *Pittman,* 499 So. 2d 114, 119 (La. Ct. App. 1986) ("the mere fact that a juror is employed by a defendant, without further showing, is not sufficient to exclude a juror for cause"); *Basin Elec. Power Coop.* v. *Miller,* 310 N.W.2d 715, 718-19 (N.D. 1981) (rejecting *per se* rule against employee-jurors); *Sansouver v. Glenlyon Dye Works,* 68 A. 545, 546 (R.I. 1908) (refusing to excuse juror who was employee of defendant's majority stockholder); *Tucker* v. *Buffalo Cotton Mills,* 57 S.E. 626, 627 (S.C. 1907) (employees of defendant not *per se* disqualified from serving on jury); *Dimmack* v. *Wheeling Traction Co.,* 52 S.E. 101 (W. Va. 1905) (same as *Sansouver*); *Purple* v. *Horton,* 13 Wend. 9, 22-23 (N.Y. 1834) (criticizing rule prohibiting juror from same "society or corporation" as party). Legal encyclopedias likewise recognize support for the principle. *See, e.g.,* 50A C.J.S. *Juries* § 384, at 416 (1997) (noting that while contrary authority exists, "it has also been held that a juror is not automatically [disqualified] merely because the juror is an employee of a party, of a party's insurer, or of the victim").

juror who had previously done business with defendant; juror characterized relationship as "sometimes adversarial"); *Vasey* v. *Martin-Marietta Corp.*, 29 F.3d 1460, 1466-68 (10th Cir. 1994) (employee of consultant for defendant may serve on jury); *Dunagan* v. *Appalachian Power Co.*, 23 F.2d 395, 397 (4th Cir. 1928) (jurors who supplied goods to defendant corporation not disqualified); *Ramirez* v. *IBP, Inc.*, 938 F. Supp. 735, 736 (D. Kan. 1996) (employee of company that did business with defendant may serve on jury), *aff'd mem.*, 131 F.3d 152 (10th Cir. 1997).

In contrast, several circuits have held (or issued dicta suggesting) that employment with a party constitutes grounds for applying the implied bias doctrine on a *per se* basis. *See, e.g., Francone,* 145 F.2d at 733 (employees incompetent to serve as jurors);[7] *accord Getter* v. *Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995) (dicta indicating same where juror was both a shareholder and spouse of a party's employee). This group of cases cannot be reconciled with the many cases cited above (*see*, *supra,* at 13-14) holding that employment or a business relationship with a party is not grounds for automatic juror disqualification for implied bias.

Family Relationships. In addition to the Eighth Circuit's refusal to recognize any *per se* category of implied bias, several circuits likewise refuse to include familial relationships in the *per se* bias category. *See, e.g., Cox* v. *Treadway*, 75 F.3d 230, 239 (6th Cir. 1996) (refusing to adopt "per se requirement that any juror with a family

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[7] *Francone* cited *Crawford v. United States,* 212 U.S. 183 (1909), as support for its conclusion that employees were *per se* biased. *See* 145 F.2d at 733 & n.2. But, this Court definitively repudiated *Crawford* in *Woods*. *Francone* also relied on a Texas statute that disqualified a party's employees from jury service *See id.* at 733 & n.4; VERNON'S ANN. TEX. CIV. STAT. ART. 2134. No such legislative mandate applies in this case.

relationship with law enforcement must be disqualified"); *United States* v. *Beasley*, 48 F.3d 262, 267 n.4 (7th Cir. 1995) (same); *United States* v. *Brown*, 644 F.2d 101, 105 (2d Cir. 1981) ("we do not wish to institute a series of presumptions of implied bias in other employment or familial relationships which might affect a juror's impartiality. To do so would burden the courts needlessly with a responsibility of endless speculation on the presumptive bias of potential jurors");[8] *United States* v. *Jones*, 608 F.2d 1004, 1008 (4th Cir. 1979) ("We decline to establish a *per se* rule of disqualification where a juror is related to a victim of a similar crime"); *United States* v. *Caldwell*, 543 F.2d 1333, 1347 (D.C. Cir. 1974) (refusing to categorically exclude relatives of police officers from jury in a criminal trial for murdering a police officer); *see also Seyler* v. *Burlington N. Santa Fe Corp.*, 121 F. Supp. 2d 1352, 1362-63 (D. Kan. 2000) (empanelling juror whose husband retired from defendant' employ after thirty years, and whose son worked for defendant).[9]

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[8] Although the court below cited *United States* v. *Haynes*, 398 F.2d 980 (2d Cir. 1968), to support its decision that Juror No. 3 was biased as a matter of law (*see* App., *infra*, at 24a), the Second Circuit rejects the *per se* bias test in familial relationships. *See Brown*, 644 F.2d at 105.

[9] Among state courts, *see, e.g.*, *Metzger* v. *Al-Ataie*, 2003 Ohio App. LEXIS 2502, at *7 (Ohio Ct. App. May 28, 2003) (allowing juror whose daughter worked for defendant clinic); *Garnick* v. *Teton County Sch. Dist. No. 1*, 39 P.3d 1034, 1043 (Wyo. 2002) (allowing juror whose son was an assistant for teacher at defendant school); *Scott* v. *Am. Tobacco Co.*, 795 So. 2d 1176, 1186 (La. 2001) (rejecting *per se* disqualification of jurors whose family members are potential beneficiaries of class action); *Lambie* v. *Schneider*, 713 N.E.2d 603, 610 (Ill. App. Ct. 1999) (empanelling juror whose father-in-law had a heart condition and was continuing patient of defendant surgeon in malpractice suit); *Savant* v. *Lincoln Eng'g*, 899 S.W.2d 120, 122-32 (Mo. Ct. App. 1995) (refusing to strike juror even though her daughter worked for insurance company covering defendant); *Estate of Hannis* v. *Ashland State Gen. Hosp.*, 554 A.2d 574, 578-79 (Pa. Commw. Ct. 1989) (empanelling juror whose child

Other Contexts in which Circuit Courts are in Conflict on the Implied Bias Doctrine. The persistence and frequency of implied juror bias issues in additional contexts – on which the circuits are similarly split – amply demonstrates the need for, and potential benefit of, this Court's review.

For example, the Fifth and Sixth Circuits have held that *Smith v. Phillips* eliminated the *per se* implied bias

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was to receive continuous treatment from defendant doctor in malpractice action); *Quincy* v. *Joint Sch. Dist.*, 640 P.2d 304, 307-308 (Idaho 1981) (upholding denial of challenge to juror whose wife was a bus driver for defendant school district in case involving collision with plaintiff by another bus driver); *Farmers Union Grain Terminal Ass'n* v. *Nelson*, 223 N.W.2d 494, 500 (N.D. 1974) (spouses of persons doing business with a cooperative are not automatically disqualified as jurors in a case involving the cooperative); *Matthews* v. *Jean's Pastry Shop, Inc.*, 311 A.2d 127, 130 (N.H. 1973) ("the relationship of another juror to an employee of the defendant [is not grounds] for absolute disqualification"); *In re Estate of O'Neill*, 190 S.E.2d 754, 759 (S.C. 1972) (persons related to employees of hospital in will contest in which hospital was potential beneficiary and party to action were not disqualified from jury); *Wilson* v. *Atl. C. L. R.R.*, 156 S.E.2d 463, 463-64 (Ga. Ct. App. 1967) ("'Relationship to an employee of a corporation does not in this State render a juror incompetent, as a matter of law, to serve on the trial of a case in which the corporation is a party'") (citation omitted); *Good* v. *Farmers Mut. Ins. Co.*, 62 N.W.2d 425, 426-27 (Wis. 1954) (wife of policyholder of defendant was not incompetent to serve on jury); *Jackson* v. *Bd. of Mayor & Aldermen*, 111 So. 828 (Miss. 1927) (any common law prohibitions of jury service did not not extend to employees' relatives); *Stewart's Adm'x* v. *Louisville & N. R.R.*, 125 S.W. 154, 157 (Ky. 1910) ("The fact that one of the jurors was related by marriage to one of the defendant's counsel, that another had a brother in the service of the defendant, and another two nephews, was no ground for setting aside the verdict"); *Hern* v. *S. Pac. Co.*, 81 P. 902, 908 (Utah 1905) (juror married to niece of defendant's employee not disqualified). Again, legal encyclopedias likewise recognize the principle. *See* 47 AM. JUR. 2D *Jury* § 307, at 961 (2d ed. 1995) ("relationship to an employee of a party litigant does not disqualify one to serve as a juror in an action by or against the employer").

presumption with respect to unauthorized communications with jurors. *Abell* v. *Potomac Ins. Co.*, 858 F.2d 1104, 1146 (5th Cir. 1988) (*Smith* standard "no longer assumes jury prejudice"), *vacated on other grounds sub nom. Fryar* v. *Abell*, 492 U.S. 914 (1989); *United States* v. *Pennell*, 737 F.2d 521, 532-34 (6th Cir. 1984) (same); *United States* v. *DeLutis*, 722 F.2d 902, 909 (1st Cir. 1983) (same). But, other circuits hold that the implied bias presumption remains viable in those circumstances. *Stockton* v. *Virginia*, 852 F.2d 740, 744 (4th Cir. 1988); *United States* v. *Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir.1985). *See, e.g., Atwood* v. *Mapes*, 325 F. Supp. 2d 950, 968-69 (N.D. Iowa 2004) (discussing split of authority).

C. The Decision Below Imposes Unwarranted Constitutional Burdens on the Jury System that this Court Should Correct

In *McDonough Power Equipment v. Greenwood*, this Court observed: "[i]t seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload." 464 U.S. 548, 553 (1984). Consistent with that observation, this Court has never interpreted the Constitution to require each juror's mind to be a *tabula rasa*. Rather, the key inquiry as to impartiality is whether jurors are capable of rendering a fair and objective verdict based upon the evidence presented. *See, e.g., Patton*, 467 U.S. at 1035-36 (in assessing a charge of bias, the question was simply "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed"); *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961) ("mere existence of any preconceived notion" relevant to the accused's guilt or innocence is not sufficient to negate impartiality); *see also Darbin* v. *Nourse*, 664 F.2d 1109, 1116 (9th Cir. 1981) (Kennedy, J., concurring) ("Even

jurors with preconceived notions about the outcome of the case can sit if they can render a fair and objective judgment based on the evidence"). Under settled principles, Juror No. 3's answers to voir dire questions fully confirmed her impartiality and fitness to serve. App., *infra,* at 126a-128a, 173a.

By crafting a category of automatic exclusion for implied bias based on an amalgam of increasingly remote inferences, the decision below mandates a new trial due to the service of a juror who is neither the employee of a party nor the spouse of a party. She is the spouse of an employee who works in a plant that is not involved in the case and who deals with products that are also not involved in the case.[10] Relying on dicta in *United States v. Polichemi,* 219 F.3d 698, 704 (7th Cir. 2000) the Federal Circuit held this relationship satisfied the standard of "even a tiny financial interest in the case." App., *infra,* at 25a. Such an attenuated inference of partiality presumed as a matter of law poses obvious and substantial problems for the fair and efficient operation of the jury system. *First*, by creating a *per se* category, the Federal Circuit precludes the appropriate inquiry into whether a juror actually has a financial interest – even a tiny one – in the outcome of the case. *Second*, the *per se* category precludes the district court from crafting inquiries and procedures that fit the circumstances and locale of trial.[11]

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10 *See* App., *infra,* at 173a. Juror No. 3's husband is an assembler at a plant in Mapleton, Illinois, a foundry facility where molten iron is poured to make engine blocks. The Mapleton plant is located approximately 80 miles from Caterpillar's fuel injection operations in Pontiac.

11 "It is also well recognized that with the small population of some counties it would be difficult to pick jurors who bear no relationship to some party in litigation." *Balavich* v. *Yarnish*, 97 A.2d 540, 542 (Me. 1953).

This case is an apt example. Peoria is a relatively small city in which Caterpillar is by far the largest employer with – as noted during voir dire – a well-known, sometimes contentious, history of labor-management relations. App., *infra*, at 63a, 70a, 87a-88a. There is, accordingly, no basis for a presumption that all employees (or their spouses) would necessarily harbor a disqualifying partiality for Caterpillar. The district court was alert to this reality. "It could be positive, it could be negative. I don't know." *Id.* at 87a. Accordingly, the court utilized procedures for individual inquiry on challenges for cause. By vacating the judgment, the Federal Circuit incorrectly eliminated all discretion to do so. Yet, it will generally be the case that a trial judge residing in the area is far better suited to detect, assess and cure any bias in the jury panel through such individual inquiry procedures. Such individual inquiries have the additional advantage of creating a full record for appellate review.[12]

Third, the Federal Circuit's rule of automatic exclusion does not even meet the needs of the very standard it is ostensibly designed to promote: "a financial interest in the case." App., *infra*, at 25a. Many family, personal and community relationships could create a greater financial interest than that of the spouse of an employee in a distant facility not involved in the case. Under the Federal Circuit's

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[12] The Texas Supreme Court recently explained the rationale for encouraging full inquiry of individual prospective jurors: "If a venire member expresses what appears to be bias, we see no reason to categorically prohibit further questioning that might show just the opposite or at least clarify the statement. If the initial apparent bias is genuine, further questioning should only reinforce that perception; if it is not, further questioning may present an impartial venire member from being disqualified by mistake." *Cortez ex rel. Estate of Puente* v. *HCCI-San Antonio, Inc.*, 2005 Tex. LEXIS 206, at *11 (Tex. Mar. 11, 2005) (citation omitted).

"tiny financial interest" standard, no actual financial interest need be proved. Anyone who owned shares in a mutual fund that holds Caterpillar stock would be subject to exclusion under this standard. Nothing in the Constitution compels or countenences that result. And, in the modern economy, this standard is flatly antithetical to the operation of the jury system. For example, the spouse of an employee making Hanes underwear (headquartered in North Carolina) would be excluded from jury service in a case against Jimmy Dean sausages (headquartered in Cincinnati), or Kiwi shoe polish, or Coach handbags, all of which are (or were) owned by Sara Lee Corporation. The spouse of an employee making Life Savers candy would be excluded from jury service in a case against Phillip Morris cigarettes, once under common corporate ownership. And, should any such person serve on a jury, the verdict would be vulnerable to attack and reversal on appeal. The dangerous fragility the decision below imposes on jury verdicts provides compelling justification for this Court's review.

II. THIS COURT SHOULD REVIEW THE FEDERAL CIRCUIT'S APPLICATION OF *MARTINEZ-SALAZAR* IN ORDER TO PREVENT ABUSE AND GAMESMANSHIP IN THE EXERCISE OF PEREMPTORY CHALLENGES

This case presents a second, related question on which the lower courts are also divided. The question involves the interpretation and application of dicta in this Court's opinion in *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), which held that a criminal defendant's exercise of peremptory challenges is neither impaired nor denied when he chooses peremptorily to remove a juror who should have been excused for cause. That decision has

resulted in considerable discord as the lower courts struggle to contend with dicta in the majority opinion suggesting that parties can undo verdicts through the stratagem of not peremptorily striking jurors they had previously challenged for cause. The possibility that a losing party may obtain reversal on appeal because of a juror who could have been excluded, has undermined the security of verdicts and aroused great judicial concern.

The decision below invites precisely the sort of gamesmanship and abuse about which Justice Scalia warned in his concurring opinion in *Martinez-Salazar*. *See* 528 U.S. at 318-19 (Scalia, J. concurring in judgment). Justice Scalia foresaw that a litigant could allow the disqualified juror to be seated, and then complain to the appellate court in the event of an adverse ruling. *Id.*

Other courts have echoed Justice Scalia's concerns that a party can keep an "ace in the hole" by not exercising peremptory challenges on an allegedly biased juror, and then appeal on the ground that the juror should have been stricken for cause. As Judge Posner opined:

> Since the use of a peremptory challenge to remove that juror would cure the judge's error, the defendant's failure to use a peremptory challenge to do this might well be thought to make the error a self-inflicted wound, as argued in a concurring opinion in *Martinez-Salazar*, 528 U.S. at 318-19. The majority opinion, however, suggests a different view—that the litigant can let the biased juror be seated and seek to reverse the adverse judgment (if one results) on appeal on grounds of bias. *See id.* at 314-17. The suggestion is dictum, and can be questioned as putting the litigant in a heads-I-win-tails-you-lose position: if he wins a

> jury verdict, he can pocket his victory, and if he loses, he can get a new trial.

Thompson v. Altheimer & Gray, 248 F.3d 621, 623 (7th Cir. 2001); *accord Merritt v. Evansville-Vanderburgh Sch. Corp.*, 765 N.E.2d 1232, 1235-38 (Ind. 2002) (party waived any implied bias challenge by not exercising peremptory strike on allegedly biased juror).[13] Similarly:

> There is no good reason to allow a party to hold an ace for reversal in the event of an unfavorable [verdict] by allowing the trial to proceed without removing a legally unqualified juror as could have been done. A party cannot excuse jurors who are otherwise qualified and keep a juror who is not qualified and thereby obtain reversal for [a] denial of a challenge for cause.

Merritt v. *Evansville-Vanderburgh Sch. Corp.*, 735 N.E.2d 269, 273 (Ind. Ct. App. 2000) (Sharpnack, C.J., dissenting), *rev'd*, 765 N.E.2d 1232 (Ind. 2002).

Such gamesmanship is precisely what occurred below. In response to voir dire questions, Juror No. 3 indicated there was nothing that would prevent her from being fair and impartial; and, further, that she could give both sides a fair trial. App. *infra*, at 128a. In reply to an inquiry by respondents, Juror No. 3 confirmed that her husband's employment had nothing to do with the Caterpillar plant or

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[13] *See also* William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1404 (Fall 2001) (noting that under *Martinez-Salazar* there is nothing to prevent, a criminal defense attorney from reasoning "'I'll think I'll keep that Klansman on the jury, who said in open court that he could not be fair to my black defendant, because I want to keep my peremptory challenges available so I can strike all Tauruses, who are well-known to be pro-prosecution'").

products involved in the case. *Id.* at 173a. Respondent's counsel said, "Great." *Id.* Subsequently, as the Federal Circuit recounted, "Sturman specifically stated it would not individually challenge Juror No. 3." *Id.* at 21a. When the time came for peremptory challenges, respondents chose to forgo the opportunity to strike Juror No. 3, although they had three challenges remaining when she was reached. *Id.* at 194a-195a. Having chosen to acquiesce in Juror No. 3's service and to bypass multiple opportunities to pursue an individual challenge for cause and an available peremptory strike, respondents opted instead to gamble on the verdict. In rewarding that tactic, the decision below exposes the serious damage to the jury system that would result if *Martinez-Salazar* is taken to such untenable lengths. "The judicial system is no place for the sport of obstruent gamesmanship." *United States* v. *Lovelace*, 683 F.2d 248, 250-51 (7th Cir. 1982).[14]

Moreover, the practical effect of respondents' tactics was to deny Caterpillar and the lower courts all opportunity to assess any presumption of bias with respect to Juror No. 3. Had respondents complied with the district court's preference for individual assessment of challenges for cause, then the record could have reflected whether there was, in fact, any

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[14] *See, e.g., Lange* v. *Schultz*, 627 F.2d 122, 126 (8th Cir. 1980) ("If Lange was concerned about the bias or prejudice of particular members of the jury, then he should have challenged these jurors for cause during voir dire); *Zamora* v. *Guam*, 394 F.2d 815, 816 (9th Cir. 1968) (defendant waived implied bias challenges by failing to follow the judge's preference for individual analysis); *United States* v. *Eldridge*, 569 F.2d 319, 320 (5th Cir. 1978) (defendant failed to create adequate record for appellate court to review claims of bias); *Moore* v. *Harris*, 469 F. Supp. 945, 952-53 (S.D.N.Y.) (defense counsel's "casual" inquiry as to juror's potential bias indicated that counsel "did not perceive the presence of [juror] on the jury as a significant threat"), *aff'd mem.*, 614 F.2d 1289 (2d Cir. 1979).

basis for excluding Juror No. 3 through the process *Smith* v. *Phillips* prescribes. In that event, respondents would have had the burden of establishing any disqualifying partiality. *Wainwright* v. *Witt*, 469 U.S. 412, 423 (1985); *Irvin*, 366 U.S. at 723. Instead, respondents bypassed the need to meet their burden and effectively sabotaged a month-long trial by keeping Juror No. 3 off the court's radar screen until after the verdict was returned. In the absence of the individual inquiry that the district court requested – and respondents chose to forgo – there is no basis for indulging a constitutionally-based presumption of implied bias and *per se* disqualification from jury duty. *See United States* v. *Rhodes*, 177 F.3d 963, 965-66 (11th Cir. 1999) (although juror's familial relationship with witness made her potentially biased, additional questioning determined that juror could fairly decide issues in case). In conflict with the decision below, the Ninth Circuit holds that a defendant waives his challenge to jurors by failing to follow the judge's preference for individual, rather than blanket *per se* analysis. *Zamora*, 394 F.2d at 816.

At the end of the day, the Federal Circuit's expansion of *Martinez-Salazar* – and parsimonious application of normal waiver standards – embraces several practical and enormously important questions that require this Court's resolution.[15] *First*, whether *Martinez-Salazar* should apply in civil cases. *Second*, whether a party's failure to utilize a peremptory strike always preserves a challenge for cause on the ground of implied bias – even when the party has expressly announced a decision not to challenge an individual juror. *Third*, whether a party can avoid meeting its burden of proving actual bias through respondents'

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15 The decision below flatly misreads *Martinez-Salazar* as "ordering a new trial because a biased juror actually sat on the jury." App., *infra*, at 27a. This Court unanimously *reversed* the grant of a new trial.

stratagem that shifts the inquiry to "implied" bias, a question of law on which no deference is given to the trial court's assessment. *Fourth*, whether the result must automatically be vacatur of the judgment and remand for a new trial. A more discerning approach – and one more in keeping with constitutional jurisprudence – would require an additional step: determining whether the complaining party has, in fact, suffered a deprivation of Seventh Amendment or due process rights.

Under the decision below, hard-fought jury verdicts are vulnerable to the whim and gamesmanship of trial strategies. Prudent appellate courts have been careful to remind counsel of their obligation to "use peremptory challenges to protect their clients against potentially biased jurors, rather than gambling everything on their ability to show bias after-the-fact and to obtain a reversal . . . on this basis." *Polichemi,* 219 F.3d at 704. Because the Federal Circuit departed from that sound principle, this Court should grant review to reverse the decision below and avert the mischief it condones and will surely spawn.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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